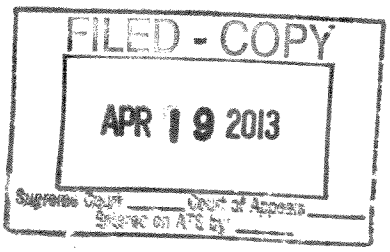
4-19-2013

Idaho Military Historical Society v. Maslen Appellant's Reply Brief Dckt. 39909

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO MILITARY HISTORICAL SOCIETY, INC., Plaintiff/Counterdefendant/Respondent, -vs- HOLBROOK MASLEN, an individual; AEROPLANES OVER IDAHO, INC., an Idaho corporation; DOES I-V; and ABC CORPORATIONS I-V, Defendants/Counterclaimants/Appellants.	**DOCKET NO. 39909-2012** Canyon County Case No. CV09-4047-C



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County
Honorable Juneal C. Kerrick, District Judge presiding.

ATTORNEYS FOR APPELLANTS

Kevin E. Dinius
Michael J. Hanby II
Dinius & Associates, PLLC
5680 E. Franklin Road, Suite 130
Nampa, Idaho 83687

ATTORNEYS FOR RESPONDENT

J. Kahle Becker
Attorney at Law
Jon M. Steele
Runft & Steele Law Offices
1020 W. Main St., Suite 400
Boise, ID 83702

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

State Rules

I.

THE DEFENSES ASSERTED WERE NOT FRIVOLOUS

A. Plaintiff's entire argument rests on a misinterpretation of Idaho law

The thrust of this appeal is best exemplified by the differing interpretations on the legal requirements necessary for a proper finding that a claim or defense was pursued frivolously. As noted in the *Appellants' Brief*, in order to be awarded attorney's fees the district court must find that the case was brought, pursued or defended frivolously, unreasonably, or without foundation.[1] When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account.[2] Pursuant to *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under Idaho Code § 12-121.[3] Specifically, the Court in that case stated:

> When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees **may not** be awarded under I.C. 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.[4]

Defendants contend that a plain reading of this language leads to the obvious and inescapable conclusion that the phrase "may not" is mandatory, rather than permissive. In other

---

[1] *Needs v. Idaho State Dep't of Cor.*, 115 Idaho 399, 766 P.2d 1280 (Ct. App. 1988) (emphasis added).
[2] 135 Idaho 518, 20 P.3d 702 (2001) (citation omitted).
[3] *Id.* (emphasis added).
[4] *Id.* (emphasis added).

words, if there is a single, legitimate triable issue of fact (even in the presence of facts or claims that are indeed frivolous) an award of attorney's fees is simply not proper.

Plaintiff argues the opposite. Plaintiff's entire argument that it is entitled to an award of attorney's fees is premised on its interpretation that "may not," as used in this context, is permissive rather than mandatory. Plaintiff argues that Defendants misinterpret this language in that "Mr. Maslen has interposed the mandatory 'cannot' for the permissive 'may not' used by this Court."[5] Pursuant to Plaintiff's interpretation of this language, a court 'may' or 'may not' award attorney fees under I.C. § 12-121, if there is a legitimate, triable issue of fact. Plaintiff's interpretation is inherently flawed both grammatically and substantively.

Indeed, Plaintiff cites to no case where a court has interpreted the phrase 'may not' as permissive. That is likely because in *In re Brandt*, it was recognized "[c]ourts that have construed 'may not' have consistently held that the phrase is mandatory and not permissive or discretionary."[6] In that case, the bankruptcy court for the district of Tennessee considered whether the term "may not" as used in the Service Members' Civil Relief Act of 2003 mandated the tolling of the statute of limitations in an adversary proceeding.[7] The language at issue in *In re Brandt* states:

---

[5] Respondent's Brief, p. 16.

[6] *In re Brandt*, 437 B.R. 294 (Bkrtcy.M.D.Tenn. 2010) (*citing Stringer v. Realty Unlimited, Inc.*, 97 S.W. 3d 446, 448 (Ky. 2002); *Clark v. Reihl*, 313 Ky. 142, 230 S.W.2d 626, 627 (1950); *In re Denial of Application for Issuance of One Original (New) On-Premises Consumption Beer/Wine License*, 267 Mont. 298, 883 P.2d 833 (1994); *Washington v. Gettman*, 56 Wash.App. 51, 782 P.2d 216, 218 (1989); *In re Meekins*, 554 P.2d 872, 875 (Okla.Ct.App. 1976); *Ryan v. Montgomery*, 396 Mich. 213, 240 N.W.2d 236 (1976); *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal.App.2d 225, 13 P.2d 983 (1944)).

[7] *In re Brandt*, 437 at 296.

> The period of a service member's military service *may not* be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the service member's heirs, executors, administrators, or assigns.[8]

The dispute centered around whether 'may not' was a permissive or mandatory term.[9] The court recognized that the United States Supreme Court has said "[t]he word 'may,' when used in a statute, usually implies some degree of discretion. The common-sense principle of statutory construction is by no means invariable, however, ..., and can be defeated by indications of legislative intent to the contrary or by obvious inference form the structure and purpose of the statute."[10]

The court in *In re Brandt*, however, went on to state that when used in conjunction with 'not,' 'may' is not deemed to connote discretion, "rather 'may not' most often is construed as if it were 'shall not.'"[11] Further, it was recognized "there is **no grammatical ambiguity** created when the legislature provides that something 'may not' be done. In a statute, the phrase, 'may not' has exactly the same meaning as 'shall not.'"[12] Based on the review of cases analyzing the term 'may not' in a similar fashion, the court found that the 'period of military service ***shall not*** be included in computing any period..."[13]

---

[8] *Id.*, p. 297 (quoting 50 U.S. C. app. § 526(a)) (emphasis in original).
[9] *Id.*
[10] *Id.*, p. 298 (citing *United States v. Rodgers*, 461 U.S. 677, 706 103 S.Ct. 2132 (1983)).
[11] *Id.*
[12] *Id.* (emphasis added).
[13] *Id.*, p. 299 (emphasis in original).

With the conclusion that "may not" is the equivalent to "shall not," it is useful to reexamine the language used in *Nampa Irrigation.* It then becomes irrefutable that "[i]f there is a legitimate, triable issue of fact, attorney fees" **shall not** "be awarded under I.C. 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation." This is the only proper interpretation of *Nampa Irrigation* and Idaho Code § 12-121 thereby making Plaintiff's entire legal argument on the issue of frivolousness unsound.

Not only is Plaintiff's interpretation of "may not" as used in *Nampa Irrigation* grammatically fallacious, it is not consistent with the remainder of the sentence in which the term is used. If a court "may" award attorney's fees when a legitimate triable issue is presented, the statement: "even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation" loses any meaning whatsoever.

Finally, Plaintiff's position that "may not" is permissive rather than mandatory conflicts with the plain language of Idaho Rule of Civil Procedure 54(e)(1) which states: "attorney fees under section 12-121, Idaho Code, **may** be awarded by the court **only** when it finds, from the facts presented to it, that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation..."[14] Again, under Plaintiff's view, a court could properly award attorney fees pursuant to this rule even if the case was not pursued or defended frivolously. Such an interpretation conflicts directly with the plain language of this rule.

Plaintiff's entire argument that it was properly awarded attorney's fees rests on the argument that 'may not' as used by this Court in *Nampa Irrigation* is permissive, rather than

[14] I.R.C.P. 54(e)(1) (emphasis added).

mandatory. If Plaintiff's position is rejected by the Court, no basis exists for an award of attorney's fees against Defendants. Therefore, Defendants respectfully request that this Court reverse the district court's award of attorney's fees to Plaintiff.

B. Defendants presented a meritorious defense

Although Plaintiff attempts to downplay their importance, it cannot be seriously disputed that Defendants prevailed on multiple claims and issues. First and foremost, Plaintiff asserted a claim of general damages totaling between $100,000 and $602,449.[15] Plaintiff asserted a claim for attorney's fees in the amount of $133,769.27 as damage in the action. [16] Finally, Plaintiff sought $60,000 in damage representing the value of the aircraft.[17] It is undisputed that Plaintiff received $0 in damage at trial. This fact alone is sufficient to establish that the defense presented cannot be deemed frivolous.[18]

Rather than dispute its failure to prove any of the damages it sought, Plaintiff downplays the issue by arguing that they were merely "post trial back of the envelope damage calculations" thereby implying that Plaintiff did not actually seek such damage.[19] One would be hard pressed to believe that had Plaintiff been awarded some or all of the damages that it claimed that Plaintiff would give up its claim or right to such damages.

Moreover, these claimed damages were much more than an "afterthought" as Plaintiff suggests. The $133,769.27 in claimed attorney's fees as damage for example was heavily

---

[15] Supp. R., p. 31.
[16] R. Vol. II, p. 159.
[17] Court Trial Day 1, pp. 65-66.
[18] *See Turner v. Willis*, 119 Idaho 1023, 812 P.2d 737 (1991).
[19] Respondent's Brief, p. 13.

litigated and disputed throughout the case and Defendants clearly and wholly prevailed on this issue. On November 25, 2011, Plaintiff filed an expert disclosure identifying John Runft, J. Kahle Becker, and Jon Steele as expert witnesses for Plaintiff's $133,769.27 in alleged attorney's fees.[20] Defendants filed a *Motion in Limine* seeking to exclude evidence of such damages.[21]

Plaintiff filed a response in opposition which takes a much different position than the one they are taking now.[22] In that response, Plaintiff states: "From the outset of this litigation, Plaintiff has claimed its attorney fees and costs as an item of damages."[23] Plaintiff stated that it had provided "regular updates as to the amount of attorney's fees throughout this litigation."[24] Plaintiff stated that it "will present evidence that its attorney's fees and costs throughout trial and a possible appeal total $133,769.27 and that 'Plaintiff and its attorneys have no objection to and stand ready to be deposed regarding these fees.'"[25] Plaintiff submitted affidavits in support of its claim for attorney's fees.[26] Even after the trial court disallowed evidence of such damage, [27] Plaintiff called its attorney Mr. Becker as a witness in an attempt to introduce such evidence.[28] Plaintiff reiterated its claim to such damage in its post-trial brief.[29]

Clearly, Plaintiff sought these damages before trial, during trial, and after trial. Despite these consistent efforts to recover hundreds of thousands of dollars, the district court awarded

---

[20] R. Vol. II, p. 212.
[21] *Id.*, pp. 168-220.
[22] *Id.*, pp. 222-36.
[23] *Id.*, p. 223.
[24] *Id.*, p. 224.
[25] *Id.*, p. 225.
[26] *Id.*, p. 140-167; 227-236.
[27] *Id.*
[28] Court Trial, Day 3, pp. 626-645.
[29] Supp. R., pp. 15-37.

Plaintiff none of the damages it claimed. Plaintiff's present argument that such evidence was merely 'post trial back of the envelope' calculations is disingenuous and ignores the undisputed facts and procedural history of the case. Hundreds of thousands of dollars may appear trivial to Plaintiff and its counsel, but such an award would have been financially devastating to Defendants. Again, the fact that Defendants prevailed on the issue of damages, precludes a finding that Plaintiff is entitled to attorney's fees pursuant to Idaho Code § 12-121.

Defendants not only presented non-frivolous defenses to Plaintiff's claims and damages, but Defendants also prevailed on a majority of the causes of actions asserted. Moreover, Defendants avoided hundreds of thousands of dollars in alleged liability. The district court, therefore, abused its discretion in determining that Defendants were liable for attorney's fees and costs pursuant to Idaho Code § 12-121.

C. AOI's Counterclaim was not pursued frivolously

AOI asserted a counterclaim against Plaintiff consisting of two counts: foreclosure of lien and unjust enrichment.[30] AOI was the only counterclaimant as Mr. Maslen did not assert any counterclaims.[31] It must also be reiterated that the lien was filed solely by AOI.[32] It was signed by Charles Vollman.[33] Holbrook Maslen did not sign or file the lien.[34]

---

[30] R. Vol. I, pp. 106-11.
[31] *Id.*
[32] Court Trial Day 3, pp. 754-55.
[33] *Id.*; R. Vol. III, p. 363.
[34] R. Vol. III, p. 363.

Despite the undisputed factual record on this point, Plaintiff continues to allege the "charges underlying Defendants' liens were false."[35] Only one defendant – namely AOI – filed a lien. As stated in the Appellants' Brief, the district court found that "Defendants' entire defense (and AOI's counterclaim) was based on the assertion that Plaintiff did not have an immediate right to possession of the aircraft (and that Defendants had such a right) because one or both of the Defendants had a valid possessory lien on the aircraft."[36]

First, it cannot be said that the counterclaim regarding the lien was frivolous. While not successful, AOI had a good faith basis for asserting the lien based upon the relationship IAHOF, the work and money expended maintaining the aircraft, as well as the fact that there was no basis to conclude that AOI was bound to provide free storage to IMHS after it acquired the aircraft.[37]

Second, these facts give rise to an equitable claim for unjust enrichment. As noted in the Appellants' brief, AOI presented competent evidence on every element of its unjust enrichment claim. First, it was undisputed at trial that the PT-23 Fairchild (and thus Plaintiffs) benefited from the required indoor storage.[38] Second, AOI presented evidence that IMHS appreciated the benefit of the storage and maintenance. It was undisputed that neither AOI nor Defendant Maslen had any agreement with IMHS to store the PT-23 – gratuitously or otherwise.[39] IMHS was aware that AOI was storing the aircraft when it was transferred.[40] Finally, AOI presented competent evidence that it would be inequitable to allow IMHS to retain the benefit of the

---

[35] Respondent's Brief, p. 14.
[36] R. Vol. III, p. 608.
[37] R. Vol. I, p. 71.
[38] Court Trial Day 3, p. 552.
[39] *Id.*, p. 749.
[40] *Id.*, pp. 530-32.

storage and maintenance without paying for it. It was undisputed that AOI never had an agreement to store the aircraft, gratuitously or otherwise, for IMHS. Clearly IMHS knowingly benefited from the storage and maintenance provided by AOI. Under these circumstances, AOI properly argued that it would be inequitable for IMHS to knowingly benefit from AOI's efforts.

Further, it cannot be found that both Mr. Maslen and AOI are jointly and severally liable for the claimed attorney's fees. There was never any finding that AOI was a 'sham entity,' despite the numerous references to such in the Respondent's Brief. Plaintiff did not bring a claim to pierce the corporate veil of AOI. The district court did not conclude that AOI was a sham entity. Absent such a finding, there is no basis for the district court to conclude that both Mr. Maslen and AOI are liable for Plaintiff's attorney's fees pursuant to Idaho Code § 12-121.

Based on the foregoing, the district court erred in concluding that AOI's counterclaim was frivolous and abused its discretion in awarding attorney's fees to IMHS under Idaho Code § 12-121 jointly and severally against AOI and Mr. Maslen.

II.

PLAINTIFF IS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL

Finally, Plaintiff contends that it is entitled to its attorney's fees for defending against this appeal. Plaintiff cites only to Idaho Code § 12-121 as a basis for an award of attorney's fees. "This Court only awards attorney fees under this statute when 'an appeal was brought, pursued, or defended in a manner that was frivolous, unreasonable, or without foundation.'"[41]

---

[41] *Clair v. Clair*, 153 Idaho 278, ___, 281 P.3d 115, 128 (2012).

First and foremost, in the event that Defendants' appeal is successful in whole or in part, an award of attorney's fees pursuant to Idaho Code § 12-121 would not be proper because it could not be said that the appeal was frivolous.

Even if unsuccessful, however, Defendants have not pursued this appeal frivolously or unreasonably. In awarding Plaintiff attorney's fees, the district court found that the defense presented was frivolous, unreasonable, and without foundation. However, Defendants have presented unrefuted facts that they avoided hundreds of thousands of dollars in liability and prevailed on a majority of the claims before the District Court. Moreover, Defendants have shown that Plaintiff's interpretation (and the district court's implicit adoption of Plaintiff's interpretation) regarding the interpretation of the term "may not" is simply incorrect. For these reasons, it cannot be said that this appeal has been pursued frivolously.

III.

CONCLUSION

Based on the foregoing, it is apparent that the district court abused its discretion in finding that Plaintiff is entitled to attorney's fees pursuant to Idaho Code § 12-121. As such, the determination that Plaintiff is entitled to such fees should be reversed.

DATED this 22nd day of April, 2013.

DINIUS LAW

By: _____
Kevin E. Dinius
Michael J. Hanby II
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 22nd day of April, 2013, a true and correct copy of the above and foregoing document was served upon the following by:

J. Kahle Becker	☐	US Mail
Attorney at Law	☐	Overnight Mail
1020 W. Main St., Suite 400	☒	Hand Delivery
Boise, ID 83702	☐	Facsimile - No. 343-3246
Jon M. Steele	☐	US Mail
Runft & Steele Law Offices	☐	Overnight Mail
1020 W. Main St., Suite 400	☒	Hand Delivery
Boise, ID 83702	☐	Facsimile - No. 343-3246

for DINIUS LAW

cm/T:\Clients\M\Maslen, Holbrook and Aeroplanes Over Idaho 24311\v. IMHS .000\Appeal\Appellants' Brief.docx